

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

ALEX ROBLES-PEREZ,
Defendant.

CR-12-2073-FVS

ORDER DENYING MOTION TO
VACATE

THIS MATTER comes before the Court based upon Alex Robles-Perez's motion to vacate his conviction on the ground his trial attorney deprived him of effective assistance of counsel in violation of the Eighth Amendment by failing to challenge the removal order that led to his prosecution under 8 U.S.C. § 1326. He is representing himself. The United States is represented by Alison L. Gregoire.

BACKGROUND

Alex Robles-Perez is a citizen of Mexico. On August 23, 2012, an Immigration Enforcement Agent found Mr. Robles-Perez in the Yakima County (Washington) Jail. Subsequent investigation revealed Mr. Robles-Perez had been removed from the United States on a number of occasions. On October 10, 2012, an Indictment was filed charging him with the crime of Alien in the United States after Deportation. 8 U.S.C. § 1326. The United States offered him a "fast track" plea agreement, which he accepted on February 14, 2013.

1 The plea agreement was presented to the Court pursuant to Federal
2 Rule of Criminal Procedure 11(c)(1)(C). The parties proposed a
3 binding sentence of 30 months imprisonment. (Plea Agreement at 2, 8.)
4 This represented a downward variance of approximately four levels.
5 Besides agreeing to a 30-month prison sentence, Mr. Robles-Perez
6 waived his right to appeal the judgment, and, with one exception, he
7 waived his right to mount a post-conviction challenge. The exception
8 is this: He may seek post-conviction relief on the ground he was
9 denied effective assistance of counsel, but only if his claim is based
10 "on information not now known by [him] and which, in the exercise of
11 due diligence, could not be known by [him] by the time the Court
12 imposes sentence." *Id.* at 9.

13 The Court accepted the proposed plea agreement and, on February
14 14, 2013, sentenced Mr. Robles-Perez to a term of 30 months
15 imprisonment. He is in the custody of the Bureau of Prisons. On
16 March 27, 2014, he filed a motion to vacate the judgment. 28 U.S.C. §
17 2255. He alleges the attorney who represented him in the instant
18 action deprived him of effective assistance of counsel in violation of
19 the Eighth Amendment by failing to challenge the removal order that
20 led to his prosecution under 8 U.S.C. § 1326. Mr. Robles-Perez
21 alleges two errors occurred in the underlying removal proceedings.
22 For one thing, he claims there is no evidence he validly waived his
23 right to counsel at the removal hearing. For another thing, he claims
24 the record does not reflect he was advised in Spanish of his right to
25 appeal. ("Motion Under 28 U.S.C. § 2255 To Vacate" at 8.) He
26 maintains the attorney who represented him in the instant action

1 should have noticed the errors that allegedly occurred in the removal
2 hearing.¹

3 **RULING**

4 Plea Agreement Contains A Valid Waiver Of Post-Conviction
5 Remedies

6 With one exception, Mr. Robles-Perez expressly waived his right
7 to file a motion to vacate the judgment pursuant to 28 U.S.C. § 2255.
8 The waiver is clear. There is no reason to question its validity.
9 Consequently, Mr. Robles-Perez is bound by its terms. *United States v.*
10 *Jeronimo*, 398 F.3d 1149, 1153 (9th Cir.2005) ("[W]e will generally
11 enforce the plain language of a plea agreement if it is clear and
12 unambiguous on its face."). He may not file a § 2255 motion unless he
13 fits within the exception set forth in the Plea Agreement. According
14 to the terms of the exception, he may seek post-conviction relief on
15 the ground he was denied effective assistance of counsel, but only to
16 the extent the claim is based "on information not now known by [him]
17 and which, in the exercise of due diligence, could not be known by
18

19 ¹Over one year after judgment was entered in the instant
20 action, Mr. Robles-Perez filed a notice seeking to commence a
21 direct appeal of the judgment. As a general rule, a district
22 court should not consider a § 2255 motion while a direct appeal
23 is pending. *United States v. Deeb*, 944 F.2d 545, 548 (9th
24 Cir.1991); *Feldman v. Henman*, 815 F.2d 1318, 1320 (9th Cir.1987).
25 However, since Mr. Robles-Perez's notice of appeal appears to be
26 untimely, and since it is unlikely the Ninth Circuit will allow
him to commence a direct appeal at this late date, the Court
properly may consider his § 2255 motion.

1 [him] by the time the Court imposes sentence." (Plea Agreement at 9.)

2 Mr. Robles-Perez Waived Ineffective Assistance Claim Based Upon
3 Alleged Defects In Removal Hearing

4 Mr. Robles-Perez alleges there is no evidence he validly waived
5 his right to counsel at the removal hearing, and he alleges there is
6 no record he was advised in the Spanish language of his right to
7 appeal. However, he may not bring an ineffective assistance claim
8 based upon the preceding allegations unless, at the time he was
9 sentenced in the instant action, he was unaware of the alleged defects
10 in the removal hearing and he could not have discovered them through
11 the exercise of due diligence. Mr. Robles-Perez cannot satisfy that
12 requirement. He was present at the hearing. Presumably, then, he
13 knew what occurred. He knew whether or not he was represented by an
14 attorney, and he knew whether or not he was advised in Spanish of his
15 right to appeal the removal order. Since he knew those things prior
16 to pleading guilty in the instant action, he cannot assert them now as
17 the basis for an ineffective assistance claim.

18 In response, Mr. Robles-Perez may deny he understood, until now,
19 the legal significance of the omissions that allegedly occurred at the
20 removal hearing. He may be correct. However, a lack of understanding
21 will not save his ineffective assistance claim. The issue is whether
22 he knew, or reasonably should have known, at the time he was sentenced
23 the facts giving rise to the claim he now seeks to assert. It matters
24 not whether he knew the legal significance of those facts. *Cf. Hasan*
25 *v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir.2001) (explaining "due
26 diligence" in the context of 28 U.S.C. § 2244(d)(1)(D)).

1. Alex Robles-Perez's "Motion Under 28 U.S.C. § 2255 to Vacate" (ECF No. 36) is **denied**.

2. The Court declines to issue a certificate of appealability.

28 U.S.C. § 2253(c)(1)(B).

DATED this 14th day of August, 2014.

Order - 5